

2011

Breakdown of the Social Democratic State: Taking a Fresh Look at Waldron's Dignity, Rights, and Responsibilities

Richard A. Epstein

Follow this and additional works at: http://chicagounbound.uchicago.edu/journal_articles



Part of the [Law Commons](#)

Recommended Citation

Richard A. Epstein, "Breakdown of the Social Democratic State: Taking a Fresh Look at Waldron's Dignity, Rights, and Responsibilities," 43 Arizona State Law Journal 1169 (2011).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

THE BREAKDOWN OF THE SOCIAL DEMOCRATIC STATE: Taking a Fresh Look at Waldron's *Dignity, Rights, and Responsibilities*

Richard A. Epstein *

In his recent lecture, *Dignity, Rights, and Responsibilities*,¹ my NYU colleague Jeremy Waldron shows his deep analytical grasp of how three large and elusive concepts can cohere as part of a single whole. As is his wont, Waldron is by nature an inclusionist. He seeks to find the best of all different strands of political and legal theory in order to integrate them into a coherent and nuanced system. At one point, he is quite content to speak of the natural rights of property as found in John Locke.² On the next occasion, there is a favorable reference to some Marxist conception of dignity or citizenship.³ Indeed, the paper is replete with learned references to Marquis de Condorcet,⁴ Immanuel Kant,⁵ Max Weber,⁶ Francisco Suarez,⁷ and others. I cannot find one reference to a learned author of whom Waldron was overtly critical.

This mode of writing does help to promote civility and deliberation, which are of course key goals that Waldron has worked to pursue for a long time. Yet at the same time this form of ecumenicalism has its price, because it is hard to tell where Waldron comes down on issues of production and redistribution that have driven huge wedges into both British and American society, to mention only the two closest to home. His style makes it too easy for him to look at many of these questions of dignity, rights and responsibilities from a high perch, which in turn allows him to underemphasize events as they unfold on the ground.

*. Laurence A. Tisch Professor of Law, New York University School of Law; the Peter and Kirsten Bedford Senior Fellow, The Hoover Institution, and the James Parker Hall Distinguished Service Professor and senior lecturer, The University of Chicago.

1. Jeremy Waldron, *Dignity, Rights, and Responsibilities*, 46 ARIZ. ST. L.J. 1107 (2012).
2. *Id.* at 1125–26.
3. *Id.* at 1122.
4. *Id.* at 1126.
5. *Id.* at 1127.
6. *Id.* at 1122.
7. *Id.* at 1128.

Here is one example of his method. Rather than talk about the intense populist struggles in both countries, his essay begins with some probing questions about the so called Straw Report, which takes as its point of departure a Green Paper which offered some preliminary observations about *Rights and Responsibilities: Developing our Constitutional Framework*⁸ written by Jack Straw and Michael Wills, high officials in the former Labour government of then Prime Minister Gordon Brown. Yet at no point does he connect this Green Report or others like it to the fiscal breakdown in England that led to the appointment of David Cameron as the British Prime Minister on May 11, 2010.⁹ Cameron has referred enigmatically to the Green Paper.¹⁰ But nothing he has said about it has anything to do with his tottering austerity program, featuring severe budget cuts intended to curb runaway deficits brought on by huge set of public entitlements that could no longer be funded even through ruinously high taxes.¹¹

The British are of course not unique in their ability to use government power to create and enforce an unsustainable set of entitlements. The same story has played out in Greece, Spain, and Italy; not to mention the United States, where social democratic institutions have not been able to bring their expenditures and revenues in line. As this paper is being written, the United States funds about forty percent of its current expenditures through borrowing, a figure that is not touched by the recent resolution of the debt crisis. The United States has not retained its triple-A credit rating with Standard and Poor's after its latest escape, and although Moody's and Fitch has not yet downgraded the United States, they have put it on special notice.¹²

What is so clear about each and every one of these system failures is that they come in societies that respond eagerly to claims of rights, responsibilities and dignity. In the abstract, it is difficult to inveigh against

8. MINISTRY OF JUSTICE, RIGHTS AND RESPONSIBILITIES: DEVELOPING OUR CONSTITUTIONAL FRAMEWORK, 2009, Cm. 7577 (U.K.), available at <http://www.justice.gov.uk/publications/docs/rights-responsibilities.pdf>.

9. Andrew Porter, *David Cameron is the New Prime Minister*, TELEGRAPH, May 11, 2010, <http://www.telegraph.co.uk/news/politics/david-cameron/7713094/David-Cameron-is-the-new-Prime-Minister.html>.

10. Waldron, *supra* note 1, at 1109.

11. Svenja O'Donnell & Robert Hutton, *Cameron Presses on with Budget Squeeze as Retailers Suffer*, BLOOMBERG, July 5, 2011, <http://www.bloomberg.com/news/2011-07-04/cameron-presses-on-with-u-k-budget-cuts-as-consumers-suffer-stores-close.html> ("Prime Minister David Cameron's refusal to compromise on the most ambitious fiscal squeeze since World War II is testing Britain's recovery as consumers lose faith in the economy.").

12. Martin Crutsinger, *Moody's Backs US Triple-A Rating; Outlook Negative*, DAILY NEWS, Aug. 5, 2011, <http://www.memphisdailynews.com/news/2011/aug/5/moodys-backs-us-triple-a-rating-outlook-negative/>.

any of these virtues. But at the same time it is difficult to be *for* any set of virtues that may well have undermined the fiscal responsibility of so many programs. The key task in this public debate therefore is to sharpen the discussion by asking what kind of dignity, rights and responsibilities are involved. It is just at this point that we should take a hard look at the older distinction between perfect and imperfect obligations.¹³ Properly understood, that distinction calls into question every major assumption of the modern social democratic paradigm that calls for extensive government regulation of private business and a broad safety net which includes the right to education, health care, housing or any other positive right any one cares to mention. These extensive claims of right have failed.

To see why this is the case, start with Waldron's sound observation that rights and responsibilities are often correlative, such that there cannot be the creation of a new right unless and until the correlative duties are specified.¹⁴ That means that we have to know for each new right who is on the hook and for how much. At this point, the key questions are what rights, what responsibilities, and for what reasons.

On this issue, my major premise is that individuals should have responsibilities to others to take care of themselves first, and to take care of others in need second. The first of these responsibilities means that all persons should work hard to obtain a degree of self-sufficiency so that they do not become a burden on others. The second means that when some individuals do fall through the cracks, there are some others who stand ready to extend a hand. The distinction matters because different sorts of institutions should be used to back up these different types of rights and responsibilities. More concretely, the individual rights that should receive legal protection are those which grant them the opportunity to become self-sufficient in the first instance, imposing nonenforceable duties to aid others in need only in the few cases where self-help does not succeed.

To implement this type of a program, we need to revert to the system of perfect and imperfect obligations that were part and parcel of the classical liberal tradition that gave birth to, among other oft-disfavored social arrangements, *laissez-faire*. Perfect obligations are backed by the force of the state, such that the violator is exposed to damages, injunctions, fines and other criminal sanctions. The first of these perfect obligations are to respect the bodily integrity and private property of all other persons, which means that there can be no murder, molestation, theft, rape or bodily harm. This protection against the use of force is no optional extra, but lies at the core of

13. For discussion, see RICHARD A. EPSTEIN, *SKEPTICISM AND FREEDOM: A MODERN CASE FOR CLASSICAL LIBERALISM* 76 (2003).

14. Waldron, *supra* note 1, at 1110–11.

our social obligations to each other. No matter how complex the society, no matter what the number of individuals in it, no matter what the overall level of wealth in society, these obligations are and remain fundamental. They should not be forgotten in particular cases simply because they are usually respected in most cases. Each person who escapes these obligations increases the social instability and diminishes the basic liberties of others.

The second of the perfect obligations has to do with keeping of promises to perform or abstain from individual actions. Individuals of full age and intelligence must take responsibility for their own actions. Holding them responsible when they make unwise bargains gives them the strong incentive to make wise ones the next time round. At this point, the requirement for self-sufficiency does not degenerate into a system-wide autarky in which individuals can rely only on their abilities to meet their fundamental biological and familial needs. They can expand the resources under their disposal by entering into those arrangements that they see as prudent. The ability to sell one's labor in an open market is a primary human right that should be protected against the interference by others, including the state.

People will often cite to the Universal Declaration of Human Rights, which proclaims "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."¹⁵ Those grand words must be fleshed out because they fall short of explaining which rights are equal and inalienable. To my mind those rights involve full civil capacity for all persons of full age and sound mind to enter into particular arrangements. It is, however, possible to invoke those same words to impose a radically different vision that involves extensive social protections that quickly require a huge social apparatus that prohibits certain labor contracts on the grounds that they do not meet minimum wage standards, or that mandates other contracts so that people cannot discriminate on the grounds of sex, race, age and the like. The decision to block private labor contracts or to force them on unwilling parties counts as a huge social mistake even if they are covered by the American antidiscrimination laws or the European Convention on Human Rights.¹⁶ The greatest protection for people against the risks of discrimination is a competitive market with free entry under which the perverse decisions of any one prospective employer (or employee) is offset by the opportunities to work with others. The need for

15. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), pmbl. (Dec. 10, 1948).

16. For my unrepentant views, see RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992).

guarantees against discrimination therefore should run against the state or other monopoly providers of services. They are surely not needed in labor markets, where the choices are always open so long as anyone can just decide to hire others as workers.

What all Western nations have to break is the now deadly cycle that says, first, we “protect” people against exploitation, and then when they cannot find a job, shower them with unemployment benefits that require higher taxes, which in turn further reduce the opportunities that are available to others. It is, in my view, no accident that the stagnant American labor market is kept back by a set of high regulations that block new job creation, and an unprecedented set of benefits now running to ninety-nine weeks, which require extensive revenues to run, which was just extended in August, 2011.¹⁷

Yes, given a dismal performance that only gets worse with time, I would at this point phase out the system, because we have shown no ability whatsoever to contain it within reasonable amounts. Obviously, that will not happen, so the short term objective should be to reduce it to something under half its size. By the same token, it is a high moral imperative that someone, somehow, has to find a way to undo all the one-sided contracts that national, state and local governments have entered into with their unionized workforces, which call for a set of unsustainable pension and health care obligations. No government should ever consent to hire workers in other than a competitive marketplace, period. The top priority that these contracts receive under current law has wrecked the financial support for other social support networks which depend on discretionary public revenues that are no longer available (it is not possible to undo institutions that perhaps never should have been created in the first place, including programs that deal with childcare and the disabled). A firm commitment, to never again allow one group to take over public resources would go a long way to the contribution of social stability. The claim that workers have rights to perpetuate these one-sided arrangements ignores the intolerable financial burdens that these outsized contracts impose on everyone else.

At this point, one could easily ask, so what is to be done with those who cannot care for themselves? To this query, the answer comes in two parts. The first is that if we reduce the welfare component and remove the obstacles to the formation of new contracts, we reduce that number of individuals to a small fraction of what it is today. The second is that we return to a system of imperfect obligations whereby people with means take

17. *New Developments on Federal Unemployment Extensions*, ST. CAL. EMP. DEV. DEP'T, http://www.edd.ca.gov/unemployment/Federal_Unemployment_Insurance_Extensions.htm (last updated Nov. 1, 2011).

it upon themselves to help fund private charitable organizations that provide targeted support for whomever they wish to help, on whatever terms they choose to supply. In this market, we can expect that all individual helpers, large and small, will have different agendas, and will choose to assist different individuals. Just let the chips fall where they may. No government should try to tame these divergent impulses, which supply the kind of redundancy and resiliency in private markets that is missing in a monolithic state-run system whose collapse leaves no viable back-up.

The key for making this system work is keeping these second-tier responsibilities out from enforcement through the legal system, which is why these obligations are called “imperfect.” Charities should not be told whom to take in, how much to spend, or whom they can exclude. Left alone they will flourish; supervised they will falter. It is critical to break the mindset that allows everyone to think that everyone else owes them positive rights of support. People should never be in the position where they can yell “tax the rich” before the state house and receive a favorable answer from legislatures who are prepared to satisfy their wishes in exchange for votes. But individuals in need can appeal to conscience, to empathy, to a sense of justice to prod people along their way. More importantly, they could rely on the actions of sensible intermediaries that will be organized through churches, fraternal organizations, friendly societies—you name it—to pitch in. It is not only the politicians that understand the burdens of poverty. It is ordinary people, both rich and poor, who can figure this out on their own. The one great virtue of this system of imperfect obligations is that its success cannot break the public purse by running up the excessive entitlements that dominate the provision of health care and social security. Those who don’t want to help the unfortunate can free ride on the rest of us—a system flaw that we should tolerate when the alternative form of ostensible public compassion leads us to a bloated public sector that is taken over by interest groups whose own sense of priorities does little to help those who are in need.

Yet what about the dignity of the individual? Here no one should have to grovel, and they won’t, at least if they are given multiple opportunities to work. But by the same token, there is no dignity in becoming a ward of the state because you cannot find work in a system which throws up so many barriers to gainful employment so that enforced idleness turns out to be a frequent, if unwanted, fate. Nor does any sense of self-worth come from then ability to game the system. The world is filled with scarcities. The question of social institutions is not how to make matters perfect for everyone. All systems fail that test. It is to understand that our current dominant views of social rights and responsibilities have stressed the

positive rights to social support over the negative rights to be free of government interference in the conduct of one's own life. The dominant regime of positive rights is not only intellectually bankrupt, but it is financially bankrupt as well. It places onerous burdens on honest people and affording too many opportunities for the less honest to game the system.

It should be evident that in our current economic downturn, no one can treat the issues of dignity, rights and responsibilities as academic disputes among the learned. It is time to take a substantive position on their content. My view is that the long-treasured attitudes toward rights, responsibilities and human dignity in social democratic tradition in which Waldron works is on the verge of disintegration. Once we recognize that point, we have to return to an older system of rights and responsibilities, which will do more for human dignity than we can ever wring out of the current legal regime.

The transitions from the current system are, to say the least difficult, if there were a broad social consensus, which today there is not, that some major repair is needed. Some half measures could well go a long way to curing the defects of the current system. But make no mistake about it. Unless we can reverse our course soon, the current situation will only intensify. The older classical liberal tradition, with its clear combination of perfect and imperfect duties, offers the only path out of the current malaise. An inclusionary frame of mind that sees the pluses and minuses of all positions will not work anymore. We need to worry less about the glories of deliberation, which have long appealed to Waldron,¹⁸ and more about making sure that we get the right answer from deliberation. We have to junk the broken theory of dignity, rights and responsibilities that dominates public discourse today, and return to the more modest, and more effective, classical liberal program.

18. Waldron, *supra* note 1; Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596 (2010).
